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In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS, et al.,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN;

Respondent.

REC'D TEAM 11
AUG 31 2001
UNSCANNED

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

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BRIEF FOR THE OKLAHOMA EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Oklahoma Education Association respectfully submits this brief *amicus curiae* in support of the Petitioners, with the consent of both parties, pursuant to Sup. Ct. R. 37.3.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Oklahoma Education Association ("OEA") is a non-profit association that represents approximately 40,000 public school employees in the state of Oklahoma. Founded in 1889 prior to statehood, the OEA represents all categories of education employees in the public school systems of the state of Oklahoma and is an affiliate of the 2.6 million member National Education Association. The OEA's primary focus is to organize around quality teaching and learning while continuing to advocate for and secure the rights and benefits of all public education employees in the state of Oklahoma.

Because the membership of the OEA, many of which are faculty members of the Petitioner School District, is directly impacted by the decision of the Tenth Circuit Court of Appeals interpreting certain portions of the Family Education Rights and Privacy Act, 20 U.S.C.

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[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Letters of consent of the parties are filed herewith.

§ 1232g ("FERPA"), the OEA has a unique interest in the detrimental effect of this decision upon quality teaching and learning – the primary focus of the OEA in its mission to promote the cause of quality public education in Oklahoma. Accordingly, the OEA respectfully submits the perspective of its membership on the significance of this ruling and its impact on traditional pedagogical teaching and learning tools commonly utilized by educators in the state of Oklahoma and throughout the nation.

SUMMARY OF ARGUMENT

Evaluation of students through grading, testing and ability grouping remains an important aspect of the American educational system. Educators throughout the nation employ a plethora of techniques and procedures in their attempt to determine the most objective evaluations of the academic and cognitive ability of the students under their charge. As a result, some system of grading or measuring the academic progress of students has been a constant in the ever evolving public education system that embodies the ideal of ensuring a free and appropriate education for our nation's children.

In the pedagogical context, a grade is an abstract bit of information reflecting the results of a homework assignment, quiz, or similar assessment. In assessing and monitoring the progress of students under their charge, a classroom teacher is constantly re-teaching those individuals who, in the assessment of the classroom teacher, have not mastered the stated objective. In this circumstance, grades assigned by a classroom teacher on routine

homework assignments or other daily classroom work are used as representations of student academic performance which reflect the particular assessment from the classroom teacher in monitoring a student's progress in mastering the stated objective. In evaluating a long-standing grading practice, the United States Court of Appeals for the Tenth Circuit has decided an important question of federal law that suddenly has a significant impact on all educators and dramatically alters long-standing customs and practices which comprise the day-to-day operation of our public school systems.

The Tenth Circuit issued a decision involving the construction and interpretation of FERPA that struck down a common grading practice utilized by public school teachers in Oklahoma and which now creates the potential for individual liability for perceived violations of FERPA in the future. The decision of the court of appeals has not only generated much confusion and uncertainty among public educators throughout the state of Oklahoma as it pertains to the legality of a traditional pedagogical practice, but also raises more questions and confusion regarding the impact of FERPA and this ruling on other traditional teaching and learning tools commonly utilized by public educators and whether such tools are also prohibited under the interpretation of this federal statute by the Tenth Circuit Court of Appeals.

Amicus curiae recognizes that the assignment of letter grades – when used as final representations of student academic performance and achievement – are important not only to the students themselves, but to parents, higher education institutions, prospective employers, and others. Although the privacy interests of both parents –

and students that are set forth in the articulated purpose of FERPA are of paramount importance, the OEA urges reversal of the Tenth Circuit decision which, if left undisturbed, will unnecessarily impact traditional pedagogical practices and potentially operate as an impediment to the educational process of local school districts in Oklahoma and throughout the nation.

ARGUMENT

The issue before the Tenth Circuit Court of Appeals was whether the common practice of allowing a student to grade another student's homework, class work, or quizzes constitutes an impermissible disclosure of an "education record" under the Family Education Rights and Privacy Act. The facts were largely undisputed and the primary legal issue before the court of appeals was whether a traditional teaching practice was prohibited under FERPA – allowing classroom teachers to have students exchange papers for the purpose of correcting erroneous responses and providing an amplified understanding of why a particular response was either correct or incorrect.

This common practice is utilized by many classroom teachers in Oklahoma and is viewed by many educators as a traditional teaching and learning tool because it allows students to receive immediate feedback on, and evaluation of, their daily work. Trading homework papers or daily work is the classroom equivalent of "flash cards." Repetition of a basic skill, coupled with immediate feedback, is a primary component in mastering a

particular academic objective. From a practical perspective, this common practice also allows teachers to be more efficient and productive in their day-to-day responsibilities of assessing the academic progress of students under their charge through their daily work.

In rejecting this common grading practice, the court of appeals concluded that, "[B]ased purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA." *Falvo v. Owasso Independent School Dist. No. I-011*, 229 F.3d 956, 969-970 (10th Cir. 2000) (Footnote omitted). Regardless of whether a grade is ultimately recorded in a grade book or utilized in calculating a final grade, the court concluded that this common grading practice was contrary to the intent of Congress when enacting FERPA and stated that "the method of reporting the grades is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another." *Falvo*, at 969 n.10. Four judges dissented from the court's order denying rehearing *en banc* and criticized the majority holding as an unwarranted expansion of the clear language of the statute which was unsupported by any legislative history. *Falvo*, at 960.

The four dissenting judges criticized the majority opinion defining "education records" and argued that the court's decision creates an implausible obligation of an educational institution under FERPA "to maintain an access record indicating those who have obtained or requested access to" the possible thousands of grades a particular student may accumulate over the course of her

common education. *Falvo,* at 961. The dissenting judges suggested that a careful reading of FERPA and its legislative history required a much narrower definition of "education record" than ascribed by the majority and further noted the "obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book." *Falvo,* at 960-961.

In examining the Joint Statement in Explanation of the Buckley/Pell Amendment, 120 Cong. Rec. 39,862 (1974), the dissenting judges noted that the Joint Statement "drew a critical distinction between an institutional record in which a grade was recorded (the accuracy of which can be challenged) and the graded material itself (the accuracy of which cannot be challenged)," and further noted that the Joint Statement concluded "that 'education records' referred only to the former." *Falvo,* at 961.

As set forth in the dissenting opinion, the court of appeals' expanded definition of "education records" creates an illogical interpretation of FERPA as a whole and is not supported by either the plain language of the statute or its legislative history. *Amicus* OEA suggests that the court of appeals' interpretation of the phrase "education records" is fundamentally flawed and that the court of appeals erred in concluding that FERPA prohibits peer grading of homework papers, class work, or quizzes in our nation's classrooms.

I. THE COURT OF APPEALS ERRED IN REJECTING THE LONG-STANDING INTERPRETATION OF FERPA BY THE FAMILY POLICY COMPLIANCE OFFICE OF THE DEPARTMENT OF EDUCATION

The traditional practice of allowing students to exchange papers for grading purposes had been recognized by the Family Policy Compliance Office ("FPCO") of the United States Department of Education as an acceptable practice under FERPA. FPCO is the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. The FPCO is also charged with providing technical assistance to educational agencies or institutions in order to ensure compliance with FERPA and its legislative mandates. In holding that peer grading of homework papers does not violate FERPA, the district court relied in part on an advisory opinion letter issued by Leroy S. Rooker, Director of the Family Policy Compliance Office, which set forth an advisory opinion by FPCO that this traditional teaching practice did not violate FERPA. (Petition for Certiorari, App. B2-B3; and F3-F6). The FPCO advisory opinion explains that FERPA does not prohibit such grading practices because homework assignments and tests, as well as the grades assigned to them by other students in such circumstances, "would fall outside the FERPA definition of education records as they are not, strictly speaking, 'maintained' by an educational agency or institution at that point." (Petition for Certiorari, App. F4-F5).

The court of appeals specifically concluded that the "Rooker letter" and subsequent declaration (Petition for Certiorari, App. F1-F3) had been afforded an undue

degree of deference by the district court and summarily concluded that the advisory opinion issued by FPCO was not entitled to the traditional doctrine of judicial deference afforded agency interpretations set forth in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Tenth Circuit concluded that because "the meaning of the terms 'education records' and 'maintained' are clear from the statute itself, and a court can only defer to an agency's interpretation if a statute is deemed ambiguous," the FPCO advisory opinion lacked "the power to persuade" and therefore was not "entitled to respect" under the rationale set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Falvo*, 229 F.3d at 969. The court of appeals further held that, assuming there existed some ambiguity in the statutory scheme, the judicial deference normally afforded an agency interpretation in those circumstances would not extend to the "Rooker letter" and subsequent declaration because the interpretations were set forth in an opinion letter issued by the administrative agency. *Falvo*, at 969 (*citing Christensen v. Harris County*, 529 U.S. 576 (2000)).

Although the court of appeals recognized that an agency opinion interpreting statutory intent is generally "entitled to respect" under the rationale set forth in *Skidmore*, the court of appeals then summarily rejected the FPCO advisory opinion by concluding that the "Rooker letter" did not contain a sufficient explanation of the agency's reasoning, failed to consider the "breadth of FERPA's language," and that the advisory opinion was based on a hypothetical consideration of the issue as

opposed to a particular factual setting in the school district. *Falvo*, at 969. Apparently relying solely on a qualifying prefatory statement set forth in the advisory opinion, the court of appeals afforded no deference to the opinion's "general discussion" of FERPA as it applied to the *identical* issue and concluded that "in issuing the opinion, the FPCO may not have thoroughly considered the issue before this court." *Falvo*, at 969.

The outright rejection by the court of appeals of the FPCO advisory opinion ignores the value that agency opinions often contribute to the judiciary. In *Skidmore*, this court acknowledged the value of such agency opinions and suggested that rulings, interpretations and opinions of an administrative agency, "while not controlling upon the courts by reason of their authority, *do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. . . .*" *Skidmore*, 323 U.S. 139, 140. (Emphasis added). In this case, the value of the agency interpretation has been ignored by the court of appeals, thereby casting doubt upon the effect of the FPCO advisory opinion and subsequent declaration on all other states not specifically included within the jurisdiction of the Tenth Circuit. For example, although the individual defendants in the instant case were afforded the defense of qualified immunity from personal liability because of reliance upon the FPCO advisory opinion, putative plaintiffs in other jurisdictions will surely assert that the law is "clearly established" when alleging future FERPA violations in jurisdictions not bound by the Tenth Circuit decision in this case – even where classroom teachers and other school officials

rely, in good faith, upon an interpretation of the federal agency created to ensure FERPA compliance.[2]

Considering the two primary purposes articulated as a basis for enacting FERPA – to ensure access to education records by students and parents and to protect the cumulative academic files of eligible students – the analysis of the court of appeals in defining what constitutes an education record under FERPA ignores the statutory context, ignores the legislative history, and clearly disregards the practical impact upon the education system in general. In short, the court of appeals attempts to transmogrify a routine homework assignment into an education record that is maintained in a student's permanent institutional academic file. For that reason alone, the FPCO advisory opinion warranted at least some minimal deference by the court of appeals, instead of complete rejection by the court of appeals and substitution of its own expanded construction of the statute.

The FPCO advisory opinion recognized the clear language of FERPA and attempted to delineate what constitutes an "education record" that is "maintained" by an educational institution by giving practical effect to all portions of the federal statute. The policies and positions formulated by the agency charged with preserving the

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[2] Although the court of appeals rejected the Rooker letter as unpersuasive, the court relied upon the FPCO's long-standing interpretation of this issue to suggest "that the right which we elucidate today was not clearly established" and then held that, as a result, the individual defendants were entitled to qualified immunity from personal liability in the lower court proceeding. Falvo, 229 F.3d at 974.

education privacy rights for parents and students are far more likely to reflect a reasoned and informed understanding of the practical aspects of the specific provisions of FERPA that impact our nation's classrooms than the often narrow and sterile view presented to a typical judge. *See, generally, Skidmore,* 323 U.S. at 139. Although the positions set forth by the FPCO in its advisory opinion may not merit the level of deference set forth in *Chevron,* OEA suggests that the advisory opinion should be afforded the "respect" warranted by *Skidmore* before the court of appeals embarks upon its own contradictory construction of the term "education records."

Although the court of appeals concluded that the "Rooker letter" lacked sufficient reasoning and failed to consider the breadth of FERPA's language, the FPCO opinion interprets the key phrase "education records" in a simple and straight-forward manner, based upon a thoughtful, common sense, and flexible approach. In contrast to the FPCO's interpretive construction of key FERPA provisions, the Tenth Circuit's expansive definition of the term "education records" was prefaced with a disclaimer: "[S]hould our interpretation cause public discomfort or impose undesired burdens, it is the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief." *Falvo,* 229 F.3d at 968. Rather than "go wherever the language and intent of the statute take us" as suggested by the court of appeals (*id.* at 968), affording the FPCO advisory opinion at least "minimal respect" would result in interpretation of this particular act of Congress in an objective manner and with the intent of producing the desired results for the

public good, particularly in view of the body of experience and informed judgment of the agency charged with preserving the education privacy rights of parents and students. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). There exists no justification for ignoring the FPCO advisory opinion and its interpretation of FERPA, particularly in view of the alternative interpretation advanced by the court of appeals.

II. THE COURT OF APPEALS' NEW DEFINITION OF "EDUCATION RECORDS" IGNORES AN ORDINARY MEANING ANALYSIS AND DRAMATICALLY IMPACTS LONG-STANDING PEDAGOGICAL PRACTICES

FERPA defines "education records" as "those records, files, documents and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The specific phrase "and other materials" is instructive in interpreting the intent of Congress and the meaning of "education records" under FERPA. The common dictionary definition of "materials" suggest something of a physical nature. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 717 (10th ed. 1998). The Latin root of the word material is identical to that of the word "matter" and is defined as a "physical substance."

See id. at 717. Applying an "ordinary meaning" analysis suggests that an "education record" is a tangible item consisting of records, files, documents, and other materials. The specific list of other materials that are included in the definition of "education records" refers to the physical repositories of information, not to the information itself. Absent this distinction between the terms "records" and "information," the definition set forth in the first descriptive subsection of FERPA, which states that "education records" are materials that "contain information" directly related to a student, is rendered superfluous and there would exist no distinction between the materials or the information itself in determining what is an "education record" under FERPA.

The second subsection of the "education records" definition set forth in FERPA requires that the records, files, documents, or other materials in question be "maintained" by the educational institution or an agent acting on behalf of the educational institution. In order to satisfy the disclosure prohibition under FERPA, the district court below utilized an ordinary meaning analysis to define the term "maintain." (Petition for Certiorari, App. B3-B4). The common dictionary definition of "maintain" is "to keep in an existing state." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 702 (10th ed. 1998). The Latin root of the word maintain means "to hold in the hand." *See id.* at 702. Pursuant to an ordinary dictionary definition, to "maintain" an education record would necessarily mean that those records, files, documents, and other materials are held and preserved in an existing state by an educational institution.

Construing these statutory terms in accordance with their ordinary meaning suggests that only those records, files, documents and other materials that are held and preserved in an existing state by an educational institution and which contain information directly related to a student are prohibited from disclosure under FERPA as "education records." In stark contrast to this basic precept, the court of appeals has determined that ordinary homework and routine quiz grades, as distinguished from the actual homework papers or quiz sheets, are education records maintained by an educational institution simply because those grades *may be* eventually recorded in a teacher's grade book.

Notwithstanding the specific language deliberately chosen by Congress when enacting FERPA, the court of appeals has extended the definition of "education record" to include the scores students may give one another on daily papers pursuant to a traditional grading practice previously deemed in compliance with FERPA by the federal agency charged with investigating, processing, and reviewing complaints and/or violations under FERPA. In expanding the ordinary meaning of the phrase "education record," the court of appeals stated that "[T]here was no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student' and thus satisfy the first element of the statutory definition for 'educational record'." *Falvo,* 229 F.3d at 970. The overly broad definition of "education records" established by the court of appeals has resulted in confusion and apprehension among educators, even to the extent of

disrupting traditional and routine pedagogical methods of learning.

For example, a common teaching and learning tool utilized by many middle school and high school teachers is the concept of peer evaluation of group work as part of an overall assessment of a particular academic activity. Such peer evaluations are common in science disciplines where students are assigned in groups for the purpose of completing a particular science project and each member of the group is required to assess or critique the participation of other members of the group with regard to achievement of the stated objective required by the particular project. Another common teaching and learning tool utilized by many pre-secondary classroom teachers is the concept of team learning wherein students are encouraged to "share with their neighbor" what they have mastered with regard to a particular learning objective and to assist fellow students in achieving the same mastery of the stated objective. These cooperative learning models are traditional pedagogical tools commonly utilized by educators in Oklahoma and are effective learning tools for particular academic disciplines. In this context, such group assessments of individual student participation would clearly involve disclosure of "education records" under the broad and expansive definition set forth by the court of appeals.

In addition to the obvious academic disciplines such as mathematics that require daily grading of written assignments or other written classroom work, other academic disciplines such as liberal arts are also impacted by the court of appeals' overly broad definition of "education records." In foreign language classes, discourse in

the particular foreign language among other members of the class is a required element of the curriculum and it would belie common sense to suggest that an "education record" – as now defined by the court of appeals – would not be disclosed by the simple observation of fellow students in their mastery (or lack thereof) of the particular foreign language. In the context of an art class, does the display of an individual student's art work on school premises impermissibly disclose an "education record" maintained by an educational agency or institution under FERPA? Similarly, one could also argue that a band teacher is now required – under the court of appeals interpretation of FERPA – to individually and in private audition each student under their charge to determine whether or not a particular student has made sufficient progress in learning a particular musical instrument and to assign "rankings" for participation in school band activities or concerts. "First chair" solo band performances during a school concert may now constitute an impermissible disclosure of "education records" under FERPA.

In more traditional academic settings, requiring a verbal presentation of a report on a particular literary work or a presentation illustrating the competing interests associated with a social or political issue is a common curriculum component and such presentations are typically used as a basis to formulate a nine-week or semester grade. Likewise, the *Socratic* methodology of teaching is utilized in many advanced secondary school curricula. Where such presentations or class participation are used as a basis to formulate a final academic grade, one could logically conclude that "education records" may be

impermissibly disclosed by such traditional practices under the court of appeals ruling.

Any routine pedagogical teaching and learning tool or practice – from routine collection of homework papers or quizzes to having students solve a physics equation on a chalkboard in front of the entire class – could clearly constitute a prohibitive practice under the court of appeals holding and subject educators and other school officials to individual liability.[3]

Although the above examples involve common teaching and learning tools utilized by many educators in Oklahoma and throughout the nation, there exists a parallel concern among educators regarding exactly what constitutes a prohibited disclosure of "education records" under the recent decision by the court of appeals. Many educators and school officials are questioning practices that reveal *any* information directly related to a student in a particular school system. For example, some school districts are now hesitant to publish honor rolls, academic achievement awards, and eligibility lists for participation in extracurricular activities for fear that such information may be construed as "education records" under the court of appeals ruling – despite a specific exception under

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[3] The only statutory remedy provided by Congress for violations of FERPA is the termination of federal funding upon a finding that an educational institution maintains a policy or practice of allowing disclosure of education records to unauthorized individuals or entities without parental consent. See 20 U.S.C. § 1232g(b)(1). The court of appeals concluded that Congress did not foreclose a remedy under 42 U.S.C. § 1983 because of the limited remedial scheme set forth in the statute itself. See Falvo, 229 F.3d at 966-967.

FERPA allowing publication of certain "directory information" under certain circumstances. *See* 20 U.S.C. §§ 1232g(a)(5)(A) and (B).

The "new" definition of education records by the court of appeals represents a clear departure from the long-standing interpretation of the FPCO as it pertains to the common pedagogical practice of peer grading. The court of appeals ruling also impacts other common teaching and learning tools utilized by many educators and casts serious doubt upon other practices that have become an integral component of the education culture. Instead of governing the permanent academic record of a particular student – normally consisting of semester or final grades, results of standardized ability or achievement tests, and other institutional information directly related to a student – an "education record" is now construed to include any *grade* or other information reflecting assessment from the classroom teacher which may or may not be recorded and contained in a record, file, document or other material maintained by a school district. *Amicus* OEA suggests that the former, rather than the latter, reflects the legislative history of FERPA as well as an ordinary understanding of the intent of Congress in enacting this federal statute.

CONCLUSION

For the reasons set forth herein, *amicus curiae* Oklahoma Education Association respectfully suggests that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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